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No. 393

In the Supreme Court of the United States

OCTOBER TERM, 1932

FEDERAL TRADE COMMISSION, PETITIONER

v.

ROYAL MILLING COMPANY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION

The Solicitor General and the Chief Counsel of the Federal Trade Commission, on behalf of the Federal Trade Commission, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered in this cause on May 4, 1932, which set aside the orders of the Federal Trade Commission requiring the several respondents to cease and desist from certain methods of competition alleged to be unfair and in violation of Section 5 of "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," c. 311, 38 Stat. 717.

STATEMENT

Complaints issued by the Federal Trade Commission in April, 1929, charged seven concerns located in Nashville, Tennessee (hereinafter referred to as the respondents), with the use of unfair methods of competition in interstate commerce, in violation of Section 5 of the Federal Trade Commission Act, by conducting the business of selling and soliciting sales of plain and self-rising wheat flour under representations, contained in their corporate or trade names, and otherwise, that they were "millers," "mills," or "manufacturers of flour," it being alleged that the use of these trade names and representations had the capacity and tendency to lead dealers and prospective purchasers of plain or self-rising flour to believe that they were buying direct from millers or manufacturers and to divert trade from competitors.

The respondents answered these complaints, and after hearing evidence (R. 35 et seq.), the Commission entered separate findings of facts and conclusions in each of the cases before it (R. 26–33, 740–747, 778–785, 816–824, 854–862, 890–899) and thereafter entered the cease and desist orders which were set aside by the court below. The findings and conclusions with respect to each of the respondents were substantially the same, and reference is here made to the findings and conclusions in one of the cases which may be taken as typical of the others.

The Commission found that McGraw and Glennon are partners conducting business under the

names "Royal Milling Company," "Richland Milling Company," and "Empire Milling Company"; that they are engaged in the business of buying flour from concerns that grind wheat into flour and then mixing such flours and in some instances adding leavening agents to create so-called self-rising flours. (R. 27.) Flour so prepared by these respondents is shipped from Nashville, Tennessee, in interstate commerce. The respondents are in competition with other partnerships, individuals, and corporations engaged in the sale of flour in interstate commerce. (R. 27.)

The Commission further found that the actual grinding of wheat into flour is a complicated process, requiring extensive and costly machinery; that the flour is milled to definite standards in order to insure uniformity; that concerns grinding wheat into flour employ chemists to analyze and test the wheats and flours and that for this purpose such firms maintain laboratories and experimental mills. It is only through such chemical tests that uniformity of brands can be maintained. (R. 28–29.) Concerns grinding wheat into flour are known as "manufacturers of flour." (R. 28.) In Nashville, Tennessee, which is the center of the flour industry in the south, concerns mixing self-rising flour and not grinding wheat into flour did not originally describe themselves as mills or milling companies or manufacturers of flour. (R. 30.)

It was further found that these respondents do not have or maintain a laboratory for testing or

analyzing the flours which they buy or sell and that they use only a test which is not adequate to determine the precise characteristics or qualities of the flour. (R. 30.) In advertising their product among the trade these respondents made statements such as "Order direct from the mill and save this [the middleman's profit] yourself" (R. 31; "Nothing can be better than the best, and we handle only the best. This is not a mere dream, but an actual fact—based on chemical analysis, baking tests, and the statements of those who sell and use our flour * * *" (R. 32). The products of these respondents are sold in containers on which appears the trade name under which the respondents sell the particular brand of flour, including the word "milling," and in addition the name given by the respondents to the particular flour.

Many dealers and consumers prefer to buy flour that comes directly from the concern which ground the wheat rather than from one which bought the flour and mixed it, packed it, and resold it, because they think that they get from the grinding concern a more uniform product or a better product for less money because of the elimination of a middleman's profit. (R. 32–33.) Many persons, dealers, and consumers have been buying respondents' flour because they believed, from the use of the trade names under which they do business or the representation

that they are "manufacturers of flour," that they were dealing with a concern grinding wheat into flour. It was also found that respondents sell their products in competition with those actually grinding wheat into flour and others engaged in the same character of business as respondents who do not represent themselves as "mills" or "milling companies" or "manufacturers of flour," and that the use of such words or terms in respondents' trade names and their representation that they are manufacturers of flour tend to and do divert trade to respondents from such competitors in the States in the southeastern section of the United States. (R. 33.)

The cease and desist orders entered by the Commission upon the basis of the findings and conclusions made required the respondents to cease from carrying on the business of selling flour under trade names which include the words "milling company" or words of like import, and from making representations that they are manufacturers of flour, or that their flour comes direct from manufacturer to purchaser, unless and until respondents actually own and operate or control a factory or mill where flour sold by them is made by grinding or crushing the wheat. (R. 34–35, 748–749, 786–787, 825–826, 863–864, 900–901.)

Respondents filed petitions in the court below asking that the orders of the Commission be set

aside. The cases were consolidated for hearing in that court and disposed of in one opinion and in a single decree. (R. 902–905.) The court below, without in any way disturbing the Commission's findings or holding that they were not supported by adequate evidence, set aside the orders of the Commission on the ground that the proceedings, as a matter of law, were not in the public interest and that the Commission acted beyond its statutory power. The basis of this decision was that the Commission had not proved or found that respondents' product was inferior to or different from the product of their competitors, and thus that the record failed to establish any injury to the public or any loss suffered by it. Since the court below did not disturb the Commission's findings or find that they were not supported by adequate evidence, it seems unnecessary for present purposes to review the evidence before the Commission.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

1. In holding that the proceeding was not in the public interest within the meaning of Section 5 of the Federal Trade Commission Act in view of the absence of any finding by the Commission or proof that respondents' product "is injurious to the consumer, or that it is in any way different from or inferior to the product of their competitors."

2. In holding that any deception which results from respondents' use of the trade names and rep-

resentations "amounts at most to a private wrong * * * and one not to be redressed by action of the commission."

3. In holding that upon the findings of fact and conclusions of the Commission the cease and desist orders made were not within the jurisdiction of the Federal Trade Commission.

4. In setting aside the cease and desist orders of the Federal Trade Commission.

REASONS FOR GRANTING THE WRIT

1. The case presents a question of public importance which has not been but should be decided by this Court. The Circuit Court of Appeals, holding that the proceeding was not in the public interest, seems to have based its conclusion that the Federal Trade Commission was without authority to issue the cease and desist orders in this case solely upon the failure of the Commission to find that respondents' product was inferior to or different from that of their competitors. The decision in this respect places a novel and, it is believed, erroneous limitation upon the Commission's jurisdiction under Section 5 of the Act. From the decisions of this Court in *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission* v. *Klesner*, 280 U. S. 19; *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, it would appear that the Commission might require the discontinuance of misrepresentations having the effect of misleading

a substantial portion of the purchasing public and diverting trade from competitors, provided that there was not involved a purely private feud between competitors. The rule applied for the first time by the Circuit Court of Appeals in this case requires in addition proof in every such case that the purchasing public was misled into buying an inferior product, even though the misrepresentation might not relate to the quality of the product, as in this case, and even though the purchaser might be led to purchase that which he would not have purchased but for the misrepresentation.

It has been held that misleading the public to its prejudice does not depend upon whether the misrepresented article is or is not superior to the article unfairly competed against, but that the test of unfair competition is whether the deceptive practice led the purchaser to buy that which he did not intend to buy. *Ohio Leather Company* v. *Federal Trade Commission,* 45 F. (2d) 39, 41 (C. C. A. 6th); *Federal Trade Commission* v. *Balme,* 23 F. (2d) 615, 620 (C. C. A. 2d) certiorari denied, 277 U. S. 598. And, in cases arising under the Food and Drugs Act, and those applying the common law of unfair competition, the quality of a product sold under a false label, or in simulation of another's product, has been held irrelevant. *United States* v. *95 Barrels of Vinegar,* 265 U. S. 438, 445; *Pillsbury* v. *Pillsbury-Washburn Flour Mills Company, Ltd.,* 64 Fed. 841, 846 (C. C. A. 7th).

2. The Circuit Court of Appeals' conclusion that if any deception resulted from respondents' representations and trade names it amounted "at most to a private wrong, as in the Klesner case," is erroneous in two respects and would have the effect of denying all redress against such misrepresentations. It seems quite clear that respondents' representations do not violate any private rights and that no private suits based upon such misrepresentations could be maintained by a competitor. *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 Fed. 744, 752 (C. C. A. 2d). Moreover, the decision in *Federal Trade Commission* v. *Klesner, supra,* does not control the present case, since that case involved a controversy between two competitors of an essentially private nature. The present case concerns misrepresentations, relating to the marketing of an important food product, which were found to deceive a substantial portion of the purchasing public.

Wherefore it is respectfully submitted that the writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

ROBT. E. HEALY,
Chief Counsel,
Federal Trade Commission.

SEPTEMBER, 1932.

BRIEF IN SUPPORT OF PETITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 902–905) is reported in 58 F. (2d) 581.

JURISDICTION

This was a petition to the Circuit Court of Appeals for the Sixth Circuit to review and set aside orders of the Federal Trade Commission entered under authority of Section 5 of "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," c. 311, 38 Stat. 717. The decree of the Circuit Court of Appeals reversing the orders was entered May 4, 1932. (R. 905.) The time for filing a petition for certiorari was duly extended by an order of one of the Justices of this Court to September 24, 1932. The jurisdiction of this Court is invoked under Section 5 (Paragraphs 4 and 5) of the Federal Trade Commission Act and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the findings of fact and conclusions of the Federal Trade Commission in this case were sufficient to support its cease and desist orders without allegation, proof, or finding that respondents' product was injurious to the public or inferior to or different from the products sold by its competitors.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914), c. 311, 38 Stat. 717,

719, is set forth in part in the Appendix, *infra*, pp. 18–21.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

The Commission in this case found, upon substantial evidence, that the terms "mill," "miller," "manufacturer," etc., as used by the respondents in their trade names, and otherwise, falsely described the business carried on by them, caused consumers who desired to purchase direct from grinding mills to purchase flour from the respondents, and diverted trade from concerns actually grinding wheat into flour which could properly be described as "mills," "millers," or "manufacturers of flour," and from concerns which carried on the same business as respondents' without representing themselves to be "millers" or "manufacturers of flour." The lower court held that, even though the consuming public might have been deceived and even though there were consumers who might have preferred to purchase flour from a grinding concern, since the Commission did not find that respondents' flours were injurious or that they were inferior to the product sold by the genuine millers, the proceeding was not "in the public interest" and the Commission was without authority to enter the order. The effect of the decision is that the misrepresentation of one's prod-

uct to the purchasing public which diverts trade from competitors is not within the reach of the statute, provided there is no misrepresentation of quality.

It is submitted that this test is unsound and should be rejected. It has been previously held in cases under Section 5 of the Federal Trade Commission Act that it was immaterial whether a misbranded or misrepresented article was superior to that for which it was offered as a substitute. In *Federal Trade Commission* v. *Balme,* 23 F. (2d) 615 (C. C. A. 2d), certiorari denied, 277 U. S. 598, the court held that there was sufficient public interest involved to support an order where the purchasing public, due to deception, secured an article which it did not intend to purchase. In that case the court stated (p. 620):

> The purchasing public should be protected from deception, if that deception results in their securing an article or product which they did not intend to purchase, as well as where an article is misbranded. *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483; *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 Fed. 744. *The test of unfair competition is whether the natural and probable result of the use by a respondent of a label which is deceptive to the ordinary purchaser makes him unwittingly, under ordinary conditions, purchase that which he did not intend to buy.* (Italics ours.)

In *Ohio Leather Company* v. *Federal Trade Commission,* 45 F. (2d) 39 (C. C. A. 6th), involving an order of the Commission prohibiting the use of the trade name "Kaffor-Kid" to describe a calfskin product, the court sent the case back to the Commission for further testimony on the question whether the public was misled by the alleged improper use of the term. There the same court which decided the present case stated (p. 41):

> The misleading of the ultimate public to its prejudice does not, of course, depend upon whether the substitute is equally as good as the original; the purchaser is entitled to get what he asks for, even if he is put off with something as good or better; but the qualities of the two articles are not immaterial in determining the purchaser's real intention and desire.

In *United States* v. *95 Barrels of Vinegar,* 265 U. S. 438, 445, a case under the Food and Drugs Act of June 30, 1906, this Court held that vinegar labeled as apple-cider vinegar but in fact made from dried apples was misbranded and stated that it was immaterial whether or not it was inferior to apple-cider vinegar.

In *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.,* 64 Fed. 841, 848 (C. C. A. 7th), a case involving the application of the common-law principles of unfair competition, the court stated:

> It is no answer to the charge of using a false and simulated brand that the article covered by the brand is of a superior quality

> to that which the purchaser desired to buy. You may not deceive a purchaser for his own benefit. The public will not be permitted to be deceived even for their own good. A purchaser has a right to buy the particular article he desires, and to be protected in the purchase.

If the test suggested by the lower court were adopted, every case under Section 5 involving misrepresentation would require a trial of the merits of the offending and competing products. Moreover, in an age when competing products tend to become standardized the consumer's choice of a particular product is often affected by collateral considerations. Each seller should be entitled to any advantage or selling point naturally accruing to him. If it is of advantage in the sale of flour to be termed a "mill," only true millers should reap that advantage. The best evidence that there is such advantage rests in the fact that these respondents have not only so described themselves but have used the term "mill" or "milling" in every trade name under which they have done business. For example, the Nashville Roller Mills sells its product also under the names of Cumberland Valley Milling Company, Belle Meade Mills, and The Red Mill (R. 783); the Snell Milling Company describes itself also as the Peabody Mill Company (R. 821); and the State Milling Company also sells as the Myracle Milling Company (R. 860). It was not merely fortuitous that all of these

names should have contained the words "mill" or "milling."

Respondents contended below that any deception which may have resulted from their use of milling names would have been cured if the Commission had accepted the offer of some of the respondents that they would state on their letterheads, circulars, etc., that they were not grinders of wheat. But if, as the Commission found, they falsely described themselves as mills, there would be no reason for permitting the misrepresentation followed by a disavowal. Moreover, a part of the deception results from the representations that consumers will save money by buying direct without the intervention of middlemen. A similar misrepresentation was the subject of the order discussed in *Federal Trade Commission* v. *Pure Silk Hosiery Mills, Inc.*, 3 F. (2d) 105 (C. C. A. 7th). Respondents themselves rehandle flour produced by millers and can not fairly claim that a middleman is eliminated by dealing with them.

The Circuit Court of Appeals stated (R. 904):

> If there is any deception in the petitioners' representations or trade names, it amounts at most to a private wrong, as in the Klesner case, and one not to be redressed by action of the Commission.

It seems quite clear that respondents' misrepresentations do not violate the private rights of their competitors. A cogent reason for the passage

of this section of the Federal Trade Commission Act was that representations which a trader made about his own product did not, under the common law, constitute unfair competition. It was necessary to recovery in a private suit that the offending party must have attempted to pass off his product as that of his competitors. *Royal Baking Powder Company* v. *Federal Trade Commission,* 281 Fed. 744, 750 (C. C. A. 2d).

In *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, this Court held that no public interest existed in a purely private controversy which had arisen between two competitors. It was stated in that case, however, that public interest might exist even though the unfair practice did not violate any private right and that in determining whether a proceeding would be in the public interest the Commission exercised a broad discretion. It is submitted that where a substantial part of the public was misled by respondents' representations, where the names used by them falsely described their relation to their product, where other misrepresentations were made in connection with its sale, and where trade was necessarily diverted from their competitors, without palming off their own products as those of any one of their competitors, the public interest was sufficiently concerned to justify the jurisdiction assumed by the Commission.

CONCLUSION

It is submitted that the decision of the Circuit Court of Appeals is erroneous, and, in view of the general importance of the question decided, the petition for the writ of certiorari should be granted.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
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Attorney,
Federal Trade Commission.

SEPTEMBER, 1932.

APPENDIX

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717, 719) provides, *inter alia:*

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.
>
> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause

shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such per-

son, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written peti-

tion praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission snall be exclusive.

* * * * *

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